NO. 80-889

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MUHAMMAD F. MALIK, Petitioner

V.

HIDDEN VALLEY CIVIC CLUB and
GEORGE A. TURNER, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The 125th Judicial District Court of Harris County, Texas, rendered judgment against Petitioner. (Petitioner's Appendix C, p. 1).

The Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissed Petitioner's appeal for want of jurisdiction in an opinion found at 601 S.W.2d 59 (Tex.Civ.App.-Houston, [1st Dist.] 1980, writ ref'd, n.r.e.).

The Texas Supreme Court denied Petitioner's application for writ of error without written opinion, finding no reversible error. (Petitioner's Appendix A).

JURISDICTION

The Petitioner seeks the jurisdiction of this Court under 28 U.S.C. 1257(3), alleging that following an unfavorable judgment in the trial court he was prohibited by state action from timely filing his motion for a new trial, and contends here that he was capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law (Petition For Writ Of Certiorari, p. 22); somehow attempting to convince this Court that the filing of a motion for new trial is a prerequisite for appeal in the State of Texas, which it is not. Rule 324, Texas Rules of Civil Procedure.

Since Petitioner apparently now agrees with the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas which found, in Malik v. Hidden Valley Civic Club et al, 601 S.W.2d

59 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd, n.r.e.), that December 24, 1979 was not a legal holiday and was therefore the last day to timely file his motion for a new trial (Petition For Writ Of Certiorari, p. 19), his sole complaint in this Court is that due to state action he was denied his right to appeal (Petition For Writ Of Certiorari, pp. 17, 22, and 23). The state action complained of is that on December 24, 1979 the Harris County Civil Courts Building was closed (Petition For Writ Of Certiorari, pp. 8, 19, and 20), although such date was not a legal holiday for procedural purposes, and Petitioner was prevented thereby from filing a motion for a new trial.

Assuming arguendo that the Harris County Civil Courts Building was closed for the purpose of Petitioner filing his motion for new trial, he should not be permitted to complain here that he was

denied thereby his right to appeal. For to perfect his appeal the Petitioner merely needed to file an appeal bond with the clerk no later than January 14, 1980. Rules 354, 356(a), 363, and 4, Texas Rules of Civil Procedure. This he failed to do, not because of state action but because of his own inaction. In State of Texas v. Gundstrom, 404 F.2d 644 (1968) it was held that courts will not pass upon a constitutional question although properly presented by the record if there is also present some other ground upon which the case may be disposed.

This Court, therefore, should not recognize probable jurisdiction nor review this case on writ of certiorari, since review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Rule 19, United States Supreme Court. No such special or important reasons exist here.

CONSTITUTION AND STATUTES

Respondent is not dissatisfied with Petitioner's presentment of "Constitution And Statutes" except that Article 2372h, Texas Revised Civil Statutes should be added and Article 2372h-1, Texas Revised Civil Statutes should be restated for comparison.

Article 2372h, Texas Revised Civil Statutes reads as follows:

"Section 1. In all counties having a population of five hundred thousand (500,000) or more according to the last preceding or any future Federal Census, the Commissioners' Court of the county shall have authority to formulate in the manner hereinafter set out rules and regulations governing the hours of work, vacation, holidays [Respondent's emphasis], sick leave, medical care, hospitalization, compensation and accident insurance,

and deductions for absences with reference to all persons who this Act affects, ...The said rules and regulations when adopted as hereinafter provided shall apply to and govern all deputies, assistants and employees of the county....."

"Section 5. Before adopting any rules or regulation, or revising rules or regulation thereto adopted in connection with...this Act, the Commissioners' Court shall give at least fifteen (15) days notice of such proposed adoption or revision of rules or regulation by publishing a notice at least once in each week for two (2) successive weeks in some newspaper published in the county in which such rules, regulations, or revisions are to be made effective of its intention to do so, and a hearing is to be held before said court at a fixed time and day to be specified in the notice.....The court shall adopt the regulations and direct

their recording upon the minutes, and upon approval thereof, as herein provided, they shall become effective..."
(Enacted 1941, amended 1949.)

Article 2372h-1, Texas Revised Civil Statutes, reads as follows:

"In each county of this State, each elected County or Commissioners' Court, as the case may be, shall have authority to provide for vacations, holidays fixed by state law [Respondent's emphasis], and such leave, without deduction of pay.....Nothing in this Act shall effect existing laws authorizing or regulating...holidays...for county employees, it being the intention of this Act only to provide such authority with respect to employees covered by this Act in counties where it does not now exist."
(enacted 1959.)

STATEMENT OF CASE

This is a deed restriction case wherein the court of first instance ordered the Petitioner to remove a mercury security light from his front yard in a residential subdivision in Houston, Harris County, Texas.

Judgment was signed on the 13th day of December, 1979.

Petitioner filed a motion for new trial on December 26, 1979. Such motion was presented to the court and was overruled without comment on January 28, 1980. (Appendix A). The Petitioner did not at anytime prior to January 28, 1980 attempt to amend such motion or present the original motion to the court. Neither in his motion for new trial nor at the hearing held on January 28, 1980 was mention made by Petitioner of the constitutional deprivation here raised.

On February 22, 1980 -- not yet having filed an appeal bond -- the Petitioner filed a motion in the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, requesting that the time alloted for filing a transcript and statement of facts be extended. (Appendix B). Again, no mention was made therein of the deprivation complained of here.

On February 26, 1980 [which was within thirty (30) days of the overruling of Petitioner's motion for new trial but not within thirty (30) days of the signing or rendition of judgment] Petitioner filed an appeal bond with the District Clerk.

On March 5, 1980 Respondent filed his first amended opposition to extension, pointing-out that Petitioner had failed to timely file his motion for new trial and had failed to perfect his appeal by timely filing the requisite appeal bond

within thirty (30) days of the signing of judgment. (Appendix C).

On March 10, 1980 Petitioner filed his response to Respondent's first amended opposition to such extension. He failed again to complain of the constitutional denial asserted here, but merely contended that December 24 and December 25, 1979 were legal holidays and, therefore, that he had until December 26, 1979 to file a motion for new trial. (Appendix D). On this same day the Court of Civil Appeals extended the time to file the transcript and statement of facts up to and including March 28, 1980.

On March 11, 1980 the Court of Civil Appeals received the transcript but did not file same until April 10, 1980.

On April 10, 1980 the Court of Civil Appeals dismissed the appeal, citing want of jurisdiction. The court held that December 24, 1979 was not a legal holiday

for procedural purposes; that Petitioner was tardy in filing his motion for new trial and filing his appeal bond; and, that the court could not acquire jurisdiction where an appeal bond has not been timely filed. Malik v. Hidden Valley Civic Club et al, 601 S.W.2d 59 (Tex.Civ. App.-Houston [1st Dist.] 1980, writ ref'd, n.r.e.).

Later that same day Petitioner filed his motion for rehearing in the Court of Civil Appeals, alleging for the first time that it was a "legal impossibility" to file his motion for new trial on December 24, 1979 because the clerk's office located in the Harris County Civil Courts Building was closed. (Petitioner's Appendix D, p. 6).

The Court of Civil Appeals overruled without comment Petitioner's motion for rehearing on April 24, 1980.

On June 17, 1980 Petitioner filed

his application for writ of error in the highest court of the state of Texas, the Texas Supreme Court.

On September 10, 1980 the Texas Supreme Court refused Petitioner's application for writ of error, finding no reversible error.

On December 29, 1980 Petitioner's petition for writ of certiorari was docketed in this Court.

In the state of Texas, motions for new trials and appeal bonds are filed with the district clerk, a county employee. Transcripts and statements of fact are filed with the clerk of the Court of Civil Appeals, a state employee. Except for one unusual case [Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Sup.Ct.-1979)], the state's legal holidays are designated under Article 4591 of the Texas Revised Civil Statutes. Smith v. Harris County-Houston Ship Chan.Nav.Dist.,

160 Tex. 292, 329 S.W.2d 845 (1959); Suarez v. A. C. Brown, 414 S.W.2d 537 (Tex.Civ.App.-Corpus Christi 1967, writ ref'd.). By virtue of Article 2372h, Tex. Rev.Civ.St., the Commissioners' Court of counties with a population of five hundred thousand (500,000) or more -- such as Harris County, Texas -- have the authority to designate holidays for employees in their county, irrespective of holidays fixed by state law. Under Article 2372h-1, Tex.Rev.Civ.St., the Commissioners' Court of all counties regardless of population have the authority to grant their county employees those holidays fixed by state law. December 24, 1979 was not a state legal holiday (Malik v. Hidden Valley Civic Club et al, supra), however it was designated as a county holiday by the Harris County Commissioners' Court. Therefore, the office of the district clerk's civil division, located in the

Harris County Civil Courts Building, was closed.

It is common knowledge among lawyers in Harris County that the county's switchboard operators have the names of district clerk deputies who may be called in case a pleading must be filed on a county holiday or after normal office hours. One of the district clerk deputies on duty December 24, 1979 for the purpose of filing any pleadings due on that date was Thomas L. Love, Assistant Chief Deputy. The county's switchboard operators would refer any emergency call relative to a deadline filing to Mr. Love. Mr. Love would review the matter and either permit same to be filed at his residence or refer the filing to the district clerk's central bonding office, which was in the Harris County Criminal Courts Building located across the street from the Harris County Civil Courts Building. It is in

this manner that Harris County provides for instruments to be filed twenty-four (24) hours a day, seven (7) days a week. (Petitioner's Appendix D, p. 1).

In addition, the home telephone numbers of both Ray Hardy, District Clerk, and Thomas L. Love, Assistant Chief Deputy, appeared in the white pages of the Greater Houston Telephone Directory on December 24, 1979 and even at this present time.

THE ARGUMENT

PETITIONER WAS NOT PROHIBITED BY STATE ACTION FROM PERFECTING APPEAL.

A motion for a new trial is not a prerequisite to the right of appeal. Rule 324, T.R.C.P. Judgment shall become final after the expiration of thirty (30) days after the date of rendition or signing of the judgment or order overruling an original or amended motion for new trial. Rule 329b(5), T.R.C.P. The appellant shall execute a bond payable to the appellee or to the clerk, and when same is filed within thirty (30) days after rendition of judgment or order overruling motion or amended motion for new trial, the appeal is perfected. Rules 354, 356(a) and 363, T.R.C.P. The Court of Civil Appeals cannot acquire jurisdiction of an appeal where an appeal bond has not been timely filed. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90

(Tex.Civ.App.-Houston [1st Dist.] 1977, no writ); Washington v. Golden State Mut. Life Ins.Co., 408 S.W.2d 277 (Tex.Sup.Ct.-1966); Malik v. Hidden Valley Civic Club et al, 601 S.W.2d 59 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd., n.r.e.). In computing any period of time prescribed by the Texas Rules of Civil Procedure, the last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday [Respondent's emphasis], in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday. Rule 4, T.R.C.P. A motion for new trial, if filed [Respondent's emphasis], shall be filed within ten (10) days after the judgment or other order complained of is rendered. Rule 329b(1), T.R.C.P.

Assuming arguendo that Petitioner's attorney did go to the Civil Courts Building on December 24, 1979 and found it

locked, and assuming further that the enactment of Article 2372h and the District Clerk's filing procedures on those county holidays which are not state legal holidays precluded Petitioner from filing his motion for a new trial on December 24, 1979 (the tenth day), Petitioner should not now be permitted to complain here that he was denied thereby his right to appeal, for to perfect his appeal he merely needed to file an appeal bond with the District Clerk no later than January 14, 1980; a task easy enough for one who allegedly was "capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law." (Petition For Writ Of Certiorari, p.22). This Petitioner failed to do not because of the state's action, but because of his own inaction.

PETITIONER WAS DILATORY IN PRESENTING MOTION FOR NEW TRIAL TO COURT

A motion for new trial, if filed [Respondent's emphasis], shall be filed within ten (10) days after the judgment or other order complained of is rendered. Rule 329b(1), supra. An original motion for new trial filed within said ten-day period may be amended without leave of the court. Rule 329b(2), T.R.C.P.

The failure of a party to file a motion for new trial within the ten-day period prescribed by subdivision 1 of Rule 329b shall not deprive the trial court of judisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered. Rule 329b(5), T.R.C.P. Therefore, under Rule 329b(5), a trial court is not precluded from acting on a new trial motion filed after the prescribed ten-day period as long as the court acts on the motion prior to judgment becoming final. Broussard v. Dunn,

568 S.W.2d 126, 128 (Tex.Sup.Ct.-1978). Once having allegedly been denied his right to file his motion for new trial within the ten-day period, Petitioner filed same on December 26, 1979 but neglected to present it to the court within the thirty-day period prescribed by Rule 329b(5), but waited until January 28, 1980 to present same to the court. (Petition For Writ Of Certiorari, p. 12). Hardly an act of one unconstitutionally deprived of filing a motion for new trial and appealing an unfavorable judgment.

It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after same is filed. Rule 329b(4), T.R.C.P. Even if December 24, 1979 had been a legal holiday for purposes of Rule 4 and Petitioner had timely filed his motion for new trial, he would have nevertheless failed to present

same within the thirty (30) days as prescribed by Rule 329b(4). January 25, 1980 was a Friday and the thirtieth day. As stated above, Petitioner did not present such motion for new trial until the following Monday, January 28, 1979 -- another example of Petitioner's inaction, not state action.

Rule 329b(4), supra, provides that at the discretion of the judge, an original motion or amended motion for new trial may be presented or hearing thereon completed after such thirty-day period. In that Petitioner did not file his motion for new trial within ten (10) days after judgment was rendered, and since the motion was not presented to nor entertained nor acted upon by the trial court within thirty (30) days after the judgment was rendered, the motion was ineffective for any purpose. Berger v. Greve, 303 S.W.2d 467 (Tex.Civ.App.-1957,

writ ref'd., n.r.e.); Broussard v. Dunn, supra. Petitioner was simply dilatory, and it was this inaction that was the cause of the Court of Civil Appeals not acquiring jurisdiction, rather than some action on the part of the state of Texas.

PETITIONER WAS NOT PROHIBITED BY STATE ACTION FROM FILING HIS MOTION FOR NEW TRIAL

Article 1820, Texas Revised Civil Statutes, provides:

> "The judgment of the court of civil appeals shall be conclusive in all cases on the facts of the case."

Article 1822, Texas Revised Civil Statutes, provides that:

> "Said Courts [Courts of Civil Appeals] shall have power, upon affidavit or otherwise as by the court may be thought proper, to ascertain such matters of fact as may be necessary to the proper exercise of jurisdiction."

The Court of Civil Appeals first determined by state substantive law that December 24, 1979 was not a "legal" holiday for purpose of Rule 4, T.R.C.P., and

that the court did not have jurisdiction for want of a timely filed appeal bond. It then determined "upon affidavit or otherwise" (Article 1822, supra) that the facts were against Petitioner in his contention that "it was a legal impossibility to file a motion for new trial or any other motion or pleading due to Ray Hardy's office being closed". (Petitioner's Motion For Rehearing, Petitioner's Appendix D, p.6). The Court of Civil Appeals has the duty of determining its jurisdiction and taking notice of lack of jurisdiction when disclosed by the record. Consolidated Cas.Ins.Co. v. Wade, 373 S.W.2d 841 (Tex.Civ.App.-1963, writ ref'd., n.r.e.).

The Court of Civil Appeals, which has been located in the Harris County Civil Courts Building for many years, certainly was aware of the facts set forth in Districk Clerk Ray Hardy's affidavit (see

Petitioner's Appendix D, p. 1) and of the District Clerk's procedure or practice of filing pleadings or instruments after normal office hours and on holidays, when the court "upon affidavit or otherwise" (Article 1822, supra) learned of Petitioner's allegation regarding the Courthouse being closed and Petitioner's alleged inability to file his motion for new trial on that date. Having weighed Petitioner's facts, the Court of Civil Appeals determined the facts to be against Petitioner and overruled his motion for rehearing, or in effect finding that Petitioner could have filed his motion for new trial on December 24, 1979 in accordance with the accepted practice of filing pleadings and other instruments on county holidays or after normal office hours. Petitioner's contention that he was prohibited from filing his motion for new trial was presented to the Court of

Civil Appeals in Petitioner's Motion For Rehearing and Petitioner's Amended Motion For Rehearing: that court found against the Petitioner, as this Court should.

NON-FEDERAL VERSUS FEDERAL QUESTION

Before considering Petitioner's Fourteenth Amendment contentions of denial of due process and equal protection, the Court should deny Petitioner's Petition For Writ Of Certiorari without considering same. For in Fox Film Corp. v. Muller, 296 U.S. 207, 210; 56 S.Ct. 183; 80 L.Ed. 158, this Court held as follows:

> "Where the judgment of a state court rests upon two grounds, one which is federal and the other non federal in character, our jurisdiction fails if the non federal ground is independent of the federal ground and adequate to support the judgment."

In State of Texas v. Gundstrom, 404 F.2d 644 (1968), it was held that courts will not pass upon a constitutional question although properly presented by the record

if there is also present some other ground upon which the case may be disposed. The court further held that if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of general law, the court will decide only the later.

Respondent contends that the case at bar should be decided against Petitioner at this point on the non-federal grounds without reaching Petitioner's constitutional or federal grounds.

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION

Petitioner contends that due to December 24, 1979 being a county holiday by virtue of the power granted by Article 2372h-1, Tex.Rev.Civ.St., he was prohibited by state action from filing his motion for new trial on a day that was not a state legal holiday, and that such prohibition was in violation of due process

and equal protection. Actually Harris County is covered by Article 2372h rather than Article 2372h-1, since said county has a population in excess of 500,000 and its Commissioners' Court has adopted and promulgated same.

First, it would be impossible in an equal protection context for a state to custom tailor every regulation to take into account mode of operation, skill, and trustworthiness of each person subject to regulation. Alladin's Castle, Inc. v. City of Mesquite, 434 F.Supp. 473. In Kimble v. Northwestern Nat.County Mut. Ins.Co., 518 S.W.2d 877 (Tex.Civ.App.-1975, writ ref'd., n.r.e.) the clerk of the trial court failed to give notice to appellant that judgment had been entered against him as required by Rule 306d, T.R.C.P. As a result of such failure, the appellant failed to file his appeal bond timely and the Court of Civil Appeals could not

acquire jurisdiction, for the timely filing of an appeal bond is mandatory and jurisdictional and cannot be waived. Glidden Company v. Aetna Casualty & Surety Company, 155 Tex. 591, 291 S.W.2d 315, 318 (1956); Nelson v. State, (Tex.Civ.App.-Waco, 1973, no writ hist.), 497 S.W.2d 538,539. The Kimble court held, at page 878, "that a clerk's failure to give notice in accordance with the provisions of Rule 306d does not excuse a party's failure to meet the timetables prescribed by Rule 356."

Second, due process was met in the case at bar by the notice provisions of Articles 2372h and 4591, supra. Petitioner was put on notice by the minutes of Commissioners' Court that December 24, 1979 was a county holiday, and he was put on notice by Article 4591, Tex.Rev.Civ.St., that December 24 was not a state "legal" holiday for procedural purposes (Rule 4,

T.R.C.P.). If this caused Petitioner concern, he should have been more diligent and made inquiries if he was not aware of the widely known practices regarding filing of pleadings on county holidays. In fact, this Court held in Wainwright v. Sykes, 433 U.S. 72, 90, 96 S.Ct. 1708, 48 L.Ed.2d 149, as follows:

> "if a...defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making his objection."

The Petitioner, being on notice of Articles 2372h and 4591, supra, and having discovered that the Harris County Civil Courts Building was locked on December 24, 1979, and that he was about to be denied his right to appeal, should have followed state procedure and filed his appeal bond within thirty (30) days of rendition of the trial court's judgment. Regardless of Petitioner's dilemma it is not within

the province of an appellate court to declare unconstitutional all that appears to be unfair and not wise exercise of powers of government. Martin v. State, 395 S.W.2d 631, cert. den., 382 U.S. 928, 86 S.Ct. 307, 15 L.Ed.2d 340.

On December 24, 1979 there were eighteen (18) civil district court (excluding family district courts) located in Harris County, Texas; all within the Harris County Civil Courts Building. Each month on a rotating basis, one District Court Judge is named to serve as presiding judge. Such presiding judge, among other things, grants or denys applications for ex parte temporary restraining orders where emergency need arises. In the event an emergency need should arise after normal office hours, during the weekends, or on holidays, it is common knowledge and practice among lawyers in Harris County that to seek a temporary restraining order they

call the county switchboard operator to obtain the names of the deputy district clerk on standby and the presiding judge, so that an application can be filed and presented to the presiding judge for signature. A similar situation and procedure confronted Petitioner's counsel on December 24, 1979. Due process does not require that a litigant or his attorney be put on notice of every action that he must take in pursuing his case. In fact, it has been held that due process does not require a litigant to be put on notice of the duly adopted and promulgated rules of the court. Rhodes v. City of Austin, 584 S.W.2d 917 (Tex.Civ.App.-1979, writ ref'd., n.r.e.).

A state is not required to provide a means of appeal in order to meet demands of due process, and admittedly when a state does provide means for appeal it cannot put limitations on it which are

discriminatory, arbitrary and totally unrelated to any possible state purpose. Compton v. Naylor, 392 F.Supp. 575. However, discrimination alone is not enough, it must be invidious discrimination. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). The right to equal protection of the laws is not denied by a state court where the same course of procedure applied to the person in question would have been applied to any other person in the same state under similar circumstances. Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805, 43 L.Ed. 91 (1898). It is not sufficient to show only that the law is enforced against some and not others; there must be a showing of actual and purposeful discrimination against the individual himself or against a suspect classification in which he falls (such as wealth, religion, or race) with no proper justifying governmental purpose

in such classifications. Snowden v. Hughes, 321 U.S. 1,8, 64 S.Ct. 397, 88 L.Ed. 497 (1944); SuperX Drugs of Texas, Inc. v. State, 505 S.W.2d 333 (Tex.Civ. App.-Houston [1st Dist.] 1974, no writ). Although Petitioner hints at race and religion (Petition For Writ Of Certiorari, pp. 1, 17) and inserts a copy of his Petition For Removal In Civil Case in his Appendix (Petitioner's Appendix D, p.2) in an apparent effort to show racial and religious bias (Petitioner's Appendix D, pp. 2, 4), he failed there and fails here to show same. After hearing Respondent's Motion To Remand, filed following Petitioner's Petition For Removal of Civil Case, the United States District Court for the Southern District of Texas (Houston Division) by written order, remanded same to the state court stating, inter alia, (Appendix E, p 4) as follows:

"The petitioner's claim of a

> denial of his constitutional rights states a cause of action in due process rather than equal protection. The petitioner's argument is that the state court acted unreasonably in not construing December 24, 1979 as a state holiday. He attacks the procedure in effect that day whereby allegedly some attorneys knew that the clerk's office would be open and others did not. However, the petitioner clearly stated that this unequal access was not based on race nor national origin since veteran black attorneys also might have known that the office was open that day. His argument is thus a due process claim of an unreasonable procedure rather than a claim of a denial of equal rights."

No discrimination in any respect was alleged prior to trial in the court of first instance and no attempt was made prior to trial to remove same to the federal courts. Purported discrimination appeared only after Petitioner failed to perfect his appeal. The burden of showing intentional and purposeful discrimination in application of the law against an individual to prove denial of due process is a heavy one. Armendariz v. State, 529 S.W.2d 525 (Tex.Crim.App.) A discriminatory

purpose is never presumed. Tarrance v. State of Florida, 188 U.S. 519,520 (1903)

It would not have mattered who Petitioner or his attorney was, the doors to the Harris County Civil Courts Building were locked against everyone on December 24, 1979 except to those who knew or, being diligent that day, learned the accepted practice of filing pleadings on county holidays, after normal office hours, and on weekends. No intentional act has been shown. The county had a right and a purpose to give its employees a holiday on Christmas Eve, December 24, 1979. Article 2372h, supra. No purposeful or intentional discrimination has been shown against Petitioner. In fact by his own admission, Petitioner "clearly stated this unequal access was not based on race nor national origin" (Appendix E, p. 5), so he should not now be permitted to complain of denial of equal protection.

PETITIONER SHOULD NOT BE EXCUSED OF STATE PROCEDURAL DEFAULT

The Petitioner should not be excused of his state procedural default. The State of Texas has a purpose in not permitting an appeal where an appeal bond has not been timely filed. That purpose is to put an end to litigation, and to permit the prevailing party to have confidence in and rely upon the judgment. Thus, as stated by this Court in Henry v. State of Mississippi, 379 U.S. 443, 447, 85 S.Ct. 564, 567:

> "These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. [Respondent's emphasis] In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

It is clear that the State of Texas has a legitimate purpose in insisting on compliance with the timely filing of an appeal bond or the timely filing of a motion for

new trial and presentment thereof to the Court, and that purpose is the finality of judgments, writs, and processes issued by its courts.

Therefore, Petitioner should not be excused of his procedural default.

CONCLUSION

Respondent prays that Petitioner's Petition For Writ Of Certiorari, as filed herein, be denied.

Respectfully submitted,

GAYLEN L. NIX
Counsel for Respondent
126 East Parker Road
Houston, Texas 77076
(713) 697-4871
State Bar No. 15040000

APPENDIX A

NO. 79-20,713

HIDDEN VALLEY CIVIC CLUB AND GEORGE A. TURNER	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	125th JUDICIAL
MUHAMMAD A. MALIK	*	DISTRICT

ORDER DENYING MOTION
FOR NEW TRIAL

ON the 28th day of January, 1980, came on to be heard in the above styled and numbered cause Defendant's Motion For New Trial, and the parties having announced ready, the court proceeded to hear the motion, and all the evidence having been presented, both sides rested, and the arguments of counsel having been heard by the Court, the Court is of the opinion that such motion should be denied; accordingly

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Motion For New Trial be and is hereby denied.

All costs of Court with respect to

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Defendant's said Motion For New Trial is hereby taxed against the Defendant, for which let execution issue unless timely paid.

SIGNED AND ORDERED on this 28th day of January, 1980.

/s/ CHARLES L. PRICE
JUDGE PRESIDING

APPROVED AS TO FORM:

/s/ GAYLEN L. NIX
Gaylen L. Nix, Attorney for Plaintiff
218 West Little York Road
Houston, Texas 77076
697 - 4871
State Bar No. 15040000

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APPENDIX B

NO. _____

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant,

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER,
Appellees

MOTION FOR EXTENSION OF TIME
TO FILE TRANSCRIPT AND STATEMENT
OF FACTS

TO THE HONORABLE JUDGES OF SAID COURT:

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court for an extension of time within which to file the transcript and statement of facts with the clerk of the court, and in support of said motion shows:

I.

The District Court of Harris County, Texas, for the 125th Judicial District of Texas, rendered judgement in said cause

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on December 13, 1979. Said court entered its order overruling Appellant's Motion for New Trial on January 28, 1980.

II.

Appellant has been unable to file said transcript and statement of facts within the required 60 day period because of the short period of time between the overruling of said motion for new trial and the expiration of said 60 day period.

WHEREFORE, Appellant prays that this court grant an extension of time within which to file the transcript and statement of facts herein, to and including March 28, 1980.

Dated February 9, 1980.

Respectfully submitted,

/s/ R. J. STRONG, JR.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713) 529-4868

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THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument being first by me duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of February, 1980.

/s/ BILLIE R. STRONG
Notary Public in and for
Harris County, Texas

My Commission Expires:
June 22, 1981

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of Time to File Transcript and Statement of Facts has been mailed to opposingcounsel, Mr. Gaylen L. Nix, 218 W. Little York Road, Houston, Texas on this 9th day of February, 1980.

/s/ R. J. STRONG JR.
R. J. Strong Jr.

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APPENDIX C

MUHAMMAD F. MALIK, Appellant
VS.
GEORGE A. TURNER, Appellee

IN THE COURT OF CIVIL APPEALS FOR THE 1st SUPREME JUDICIAL DISTRICT OF TEXAS

NO. 17694

APPELLEE'S FIRST AMENDED OPPOSITION TO MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now GEORGE A. TURNER, Appellee in the above styled and numbered appeal, and opposes the appellant's motion for extension of time for filing of transcript and statement of facts for the following reasons:

1. Rule 354 of the Texas Rules of Civil Procedure requires the appellant to execute an appeal or cost bond payable to the appellee or to the clerk in the sum of $500.00 unless excused by law. Rule 356 requires the bond be filed with the clerk within thirty days after rendition of judgment or order overruling motion for

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new trial, or after motion for new trial is overruled by operation of law. An appeal can only be perfected once, either by giving of a cost bond or by filing of a proper affidavit under Rule 355. The requirement that a cost bond be filed within thirty (30) days, as aforesaid, is mandatory and the Court of Civil Appeals cannot acquire jurisdiction of an appeal where an appeal or cost bond has not been timely filed. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90 (Tx.Civ.App. -Houston(1st)-1977, no writ history); Martinez v. Euler, 524 S.W.2d 814 (Tx.Civ. App.-Corpus Christi, 1975, no writ history). The judgment in this case was rendered on the 13th day of December, 1979, and the appellant gave notice of appeal therein. Then on December 26, 1979, the appellant filed his motion for a new trial. The trial overruled this motion for new trial on January 28, 1980, although the trial

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court had lost its jurisdiction. The appellant filed his appeal or cost bond on February 25, 1980 (although appellee has received no notice thereof as required by Rule 354(b)). The appellant was required to file his motion for a new trial on December 24, 1979, which was within the ten (10) of rendition of the judgment as required by Rule 329b. Thus this Court does not have jurisdiction in that the appellent was required to file his appeal or cost bond within thirty (30) days of the rendition of the judgment, to wit: by January 12, 1980. Therefore, the Court should not extend the time of filing the transcript, but should require it to be filed within sixty days from the rendition of the final judgment as required by Rule 386, which would be by March 12, 1980. Upon the filing of such transcript the Court should take jurisdiction only to dismiss the appeal for want of jurisdiction

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for the reason set forth above.

2. The appellants said Motion to Extend fails to state facts which tend to show why he has been unable (or will be unable) to file said transcript and statement of facts as specified by the Rules of Civil Procedure.

3. Appellant's request for additional time is dilatory only. The appellant has failed to post a Supersedeas Bond to suspend the execution of the judgment ($2,000.00 attorney's fees) and to stay the force and effect of the trial court's mandatory injunction to remove a certain light pole from his front yard, hoping that the trial court will not hold him in contempt for his failure to obey the Court's order merely because he filed an appeal, thereby causing the appellee additional expenses for filing a motion for contempt without success, and further hoping that the appellee's execution on

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the money portion of such Judgment will be returned Nulla Bona. Thus by being dilatory in the Court of Civil Appeals, the appellant will effectively defeat the trial court's order which is designed to protect the appellee from suffering irreparable harm.

Wherefore, Appellee prays that the appellant's time, as provided by the Rules of Civil Procedure, for filing the transcript and statement of facts in this case not be extended past March 12, 1980, and in no event past March 28, 1980, which is sixty (60) days after the trial court overruled appellant's motion for a new trial without jurisdiction.

Respectfully submitted,

/s/ GAYLEN L. NIX
Gaylen L. Nix
Attorney for Appellee
218 West Little York
Houston, Texas 77076
(713) 697-4871
State Bar No. 15040000

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APPENDIX D

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

RESPONSE TO APPELLEE'S FIRST AMENDED OPPOSITION TO MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW Muhammad F. Malik, Appellant in the above styled and numbered cause, and files this his response, and in support thereof would respectfully show the court the following:

I.

The District Court of Harris County, Texas, for the 125th Judicial District, rendered judgement in said cause on December 13, 1979. Appellant timely filed his Motion for New Trial in said district court on December 26, 1979. Said district

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court entered its order overruling Appellant's Motion for New Trial on January 28, 1980.

II.

Appellee is under the mistaken belief that Appellant's Motion for New Trial should have been filed no later than December 24, 1979. However, since the Supreme Court of Texas handed down its decision in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979), it is clear that December 24, 1979, and December 25, 1979, were both legal holidays for procedural purposes. See Paragraph B, Section 7, Article 9, HB 558; and, Article 2372h-1, Vernon's Revised Civil Statutes.

III.

Accordingly, Appellant had thirty (30) days after January 28, 1980, to file his appeal bond which, at the latest would have been February 27, 1980. Appellant filed his appeal bond, in the amount of

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$500.00, before February 27, 1980, which satisfies the time limit of Rule 356(a) of the Texas Rules of Civil Procedure.

IV.

On February 28, 1980, following a telephone call to opposing counsel on February 26, 1980, informing him of the filing of an appeal bond, the undersigned attorney notified said opposing counsel of the filing of the appeal bond in a letter. Unless due to a failure of the U.S. mail service, said opposing counsel should have received said notification on February 29, 1980, or on March 1, 1980. In any event, opposing counsel has received actual notice of the date of filing of said bond.

V.

Appellant's request for an extension of time is only based upon the court reporter of the 125th District Court's belief that the portion of the statement of facts requested by Appellant will be

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prepared about that date.

WHEREFORE, Appellant prays that he be given until March 28, 1980, to file the transcript and statement of facts with the Clerk of this Honorable Court, the time estimated by the court reporter of the 125th District Court that he will have the statement of facts prepared for filing, and that Appellee's Opposition to Motion for Extension of Time for Filing Transcript be in all things overruled.

Respectfully submitted,

/s/ R. J. STRONG JR.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713) 529-4868
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Appellee's First Amended Opposition to Motion for Extension of Time for Filing Transcript has been mailed to Gaylen L. Nix, Esq., 218 West Little York, Houston, Texas on this 10th day of March, 1980.

/s/ R. J. STRONG JR.
R. J. Strong Jr.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER, Respondents	
VS.	CIVL ACTION NO. H-80-806
MUHAMMAD F. MALIK, Petitioner.	

ORDER

Came on to be heard respondent's Motion to Remand requesting this Court to remand this case to the 125th District Court of Harris County, Texas, from which it was removed. For the following reasons, the Court GRANTS the respondent's motion.

This action was originally filed in the 125th District Court of Harris County, Texas, by the Hidden Valley Civic Club and George A. Turner, respondent herein, to enforce certain deed restrictions applying to the lot of the petitioner, Muhammad F. Malik. That case was heard on October 15,

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1979, before a jury, and as a result of the jury's verdict the trial judge issued an Order of Permanent Injunction on December 13, 1979. This Order required the petitioner to remove a certain utility structure from his lot and to pay the respondent, George A. Turner, the sum of $2,000.00 in attorney's fees and costs of court. Respondent Hidden Valley Civic Club was dismissed from the case.

Thereafter, the petitioner filed a motion for a new trial which was overruled on January 28, 1980. The trial court judge found that the petitioner had not filed his motion within the required ten (10) day period. The petitioner argues that his motion was timely since December 24th should have been considered a holiday under state law and should not have been counted in determining the expiration date of the ten (10) day time period. The petitioner's appeal to the Court of Civil Appeals, First

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District (Houston), was similarly dismissed on April 10, 1980, for lack of jurisdiction on the basis that the petitioner's appeal bond had not been timely filed.

On February 27, 1980 the petitioner filed a supersedeas bond in the sum of $2,500.00 to stay execution upon the $2,000.00 money judgment and costs of court. However, the petitioner did not request the state court to set a supersedeas bond to stay the court's order of permanent injunction. On March 10, 1980, respondent Turner filed a motion requesting the state court to find the petitioner in contempt of court for refusing to remove the offending utility structure pursuant to the Court's December 13, 1979 Order. On April 11, 1980, the petitioner filed his petition for removal in this Court claiming jurisdiction under 28 U.S.C. § 1443(1).

The petitioner argues that the state

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court proceedings denied him certain constitutional and statutory rights, specifically 42 U.S.C. §§ 1981, 1983, and 2000a. However, in order to remove a state court proceeding to federal court under 28 U.S.C. § 1443(1), the petitioner must show that the right allegedly denied to him arises under federal law providing for specific civil rights stated in terms of racial equality, and that the petitioner is unable to enforce these rights in state courts. Johnson v. Mississippi, 421 U.S. 213 (1975). The Court finds that the petitioner has failed to make either showing.

The petitioner's claim of a denial of his constitutional rights states a cause of action in due process rather than equal protection. The petitioner's argument is that the state court acted unreasonably in not construing December 24, 1979 as a state holiday. He attacks the procedure in effect that day whereby allegedly some

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attorneys knew that the clerk's office would be open and others did not. However, the petitioner clearly stated that this unequal access was not based on race nor national origin since veteran black attorneys also might have known that the office was open that day. His argument is thus a due process claim of an unreasonable procedure rather than a claim of a denial of equal rights.

Furthermore, the petitioner has not demonstrated that he is unable to enforce the denied federal rights in state court. The petitioner could have obtained a stay not only of the money judgment but of the order of permanent injunction as well by following the procedures set out in Rule 364(e) of the Texas Rules of Civil Procedure. Had he done so, the petitioner would not now be faced with a contempt proceeding for failing to remove the offending utility pole. Moreover, the

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petitioner still has available to him the right to seek review by the Supreme Court of the State of Texas on the question of the alleged violation of his due process rights in the filing of his motion for a new trial.

Consequently, the petitioner has failed to establish that 28 U.S.C. § 1443(1) allows him to remain in federal court since he is unable to demonstrate that he cannot enforce in the state courts his right of equal protection as a citizen of the United States.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that the respondent's Motion to Remand is GRANTED.

DONE at Houston, Texas, this 6 day of June, 1980.

/s/ GABRIELLE K. McDONALD
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent George A. Turner hereby certifies that on the 28th day of January, 1981, three (3) copies of Respondent's Response To Petition For Writ Of Certiorari was served upon counsel for Petitioner by mailing same to him at his address of record by U. S. Certified Mail No. P20 139774 9, return receipt requested, postage prepaid.

GAYLEN L. NIX
Counsel for Respondent